

STATE OF VERMONT
HUMAN SERVICES BOARD

In re)	Fair Hearing No. 12,600
)	
Appeal of)	
)	

INTRODUCTION

The petitioner seeks expungement of a finding by the Department of Social and Rehabilitative Services that he abused his daughter. The issue is whether the Board should accept the factual findings and legal conclusions made by the Family Court as its findings and conclusions in this matter.

FINDINGS OF FACT

1. On December 17, 1992, the Department of Social and Rehabilitation Services, following an investigation of a report of sexual abuse, substantiated that report naming the petitioner as the perpetrator and his daughter, who was then six, as the victim.

2. Based on the same facts alleged in the report, the child's guardian ad litem had petitioned the Windham County Family Court on December 7, 1992, for relief from abuse which request resulted in a suspension of the visitation rights which the petitioner had with his daughter pursuant to a former decree of divorce dated June 28, 1991.

3. The petitioner filed a motion on December 21, 1992, for relief from the decree seeking both expanded

visitation with and custody of the child which went to a hearing at which the petitioner was represented by an attorney, as was his ex-wife and the child. The Court made findings dated March 22, 1993, which are attached hereto as Exhibit A and is incorporated by reference herein. Those findings concluded that the child had been sexually abused by someone but that the perpetrator had yet to be identified. In the interim, while an evaluation was being conducted, the Court ordered supervised visitations by the petitioner with the child and restricted his telephone and mail contact with the child and his visits with her at school.

4. The petitioner's motion along with those made by the guardian ad litem, the ex-wife, the petitioner's mother and an attorney seeking fees were consolidated and set for a hearing which commenced December 21, 1992, and continued for four more days, concluding on October 3, 1994. At that hearing, all parties were represented by attorneys and discovery and depositions were available as in all family proceedings. Following the hearing, the Court issued extensive findings of fact covering some thirty-one pages which focussed primarily on whether or not the petitioner had sexually abused his daughter. The Court made a final judgment dated November 15, 1994, that clear and convincing evidence existed showing that the petitioner had sexually

abused his daughter. He was denied any further contact with the child until he took steps to remediate the situation based on a finding that further contact would likely result in abuse. A copy of the Court's decision is attached hereto as Exhibit B and is incorporated by reference herein.

5. The original substantiation made by SRS in this matter was appealed by the petitioner on January 27, 1994. Based on the representation by the Department that the same issue was in the process of being decided by the Windham Family Court, the hearing officer granted the Department's motion for a continuance until the Court made its final decision. On February 7, 1995, SRS notified the Board of the Family Court's decision. At that point, the petitioner asked for an indefinite continuance of this matter while he pursued further motions and appeals which request was granted as there was no prejudice to the Department. (The petitioner's substantiation remains on the record unless and until the Board expunges it.) After hearing nothing further from the petitioner for over two years, the petitioner was contacted by the Board and the matter was reset for hearing on December 2, 1997.

6. The petitioner agrees that he was a party at the family court hearing, that he was represented at all times by counsel in the prior proceeding, that whether he had sexually abused his daughter or not was the focus and

central issue in the proceedings, that he had a powerful incentive to litigate the issue because the future of his relationship with his daughter was at stake and that the court made a final decision in this matter which he chose not to appeal.

7. The petitioner asserts, however, that it is not fair to adopt the Family Court's findings in this matter because they are flawed in that they reflect a disregard of some evidence and improper weight given to other evidence. His criticism of the Court's findings are extensively set out in his memorandum. He also points out that his ex-wife and the guardian ad litem had the support of SRS and free access to its expert witnesses, a considerable resource which he did not have the financial wherewithal to meet. Furthermore, the petitioner wishes to raise the issue of the lack of evidence upon which SRS based its initial finding of abuse in December of 1992, as a basis for expungement.

8. It cannot be found based on the above facts that it would be unfair to use the Court's findings in the Family Court matter as the Board's findings herein. In contrast to this proceeding, in the Family Court proceeding the petitioner had all the procedural safeguards guaranteed by the Vermont Rules of Civil Procedure available to him and he was represented every step of the way by an attorney. The issue to be decided here against the petitioner is the same

one that was essential to and decided in the Family Court matter. The decision of that Court was final and has not been attacked in any way or appealed in over two years. The petitioner's dissatisfaction with the Court's weighing of the evidence and its conclusions is not sufficient to reject those findings which were based upon five days of testimony and a very detailed analysis of the evidence. The petitioner cannot collaterally attack the findings of the Court in this forum. His disagreement should have been expressed through motions or an appeal of the Family Court's decision, a fact of which he was no doubt aware as he had the assistance of counsel at that time. Furthermore, the same financial disadvantage which he claimed to be under at the family hearing would arise again in any hearing the Human Services Board might hold. The petitioner has put forth no credible argument for rejecting the findings of fact entered by the Family Court.

ORDER

The factual findings and conclusions of sexual abuse made by the Family Court are adopted by the Board. Based on those findings the decision of SRS substantiating abuse against the petitioner is accurate and reliable and is not expunged.

REASONS

The petitioner has made application for an order to expunge a substantiation of abuse placed by SRS in its registry. This application is governed by 33 V.S.A. ' 4916 which provides in pertinent part as follows:

(h) A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him or her on the grounds that it is unsubstantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under section 3091 of Title 3 on the application at which hearing the burden shall be on the commissioner to establish that the record shall not be expunged.

Under the statute's definitions, a report is substantiated when "the commissioner or the commissioner's designee has determined after investigation that a report is based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected." 33 V.S.A. ' 4912(10). Abuse is specifically defined in the regulations which are set out in pertinent part as follows:

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.

. . .

(8) "Sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting,

counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts

a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

33 V.S.A. ' 4912

The issue presented here is whether the Board is bound by a decision of the Family Court in a custody and visitation proceeding finding that a child has been sexually abused by her father. The Department argues that not only do these findings have a high degree of accuracy because they were the result of a long and detailed process in which the petitioner had significant procedural protections but also because the findings were made under a statute requiring a standard of clear and convincing evidence, a much higher standard than the "preponderance of the evidence" used by the Board in expungement cases. The Department thus moved to dismiss this matter as being "precluded" by the Family Court.

The statute at 33 V.S.A. ' 4916(h) cited above specifically states that the Human Services Board, not the Family Court, must make decisions on requests to expunge findings from the registry. It must be concluded that the Family Court could not, and indeed did not, consider and decide the petitioner's request for expungement from the registry. Therefore, the petitioner's claim for expungement is properly before the Board at this point, as his claim for expungement from the registry could not have been raised before the Family Court. Therefore, the decision of the

Family Court does not deprive the Board of jurisdiction to hear this separate claim. See American Trucking Assoc., Inc. v. Conway 152 Vt. 363 (1989). This matter may not be dismissed for that reason.

Although the petitioner's claim is properly before the Board, the Board can conclude either in the interests of judicial economy or as a matter of res judicata to adopt the findings of the court both with regard to the existence of the underlying facts and with the conclusion that abuse occurred if it is fair to the petitioner. See Fair Hearing No. 11,444. The petitioner is not allowed to relitigate issues--i.e., whether he performed certain sexually abusive acts--which have already been decided by the Family Court. The Supreme Court has made it clear that a forum is collaterally estopped from trying issues again which have already been decided provided the following criteria are met:

(1) preclusion is asserted against one who was a party or in privity with a party in the earlier action;

(2) the issue was resolved by a final judgement on the merits;

(3) the issue is the same as the one raised in the later action;

(4) there was a full and fair opportunity to litigate the issue in the earlier action; and

(5) applying preclusion in the later action is fair.

Trepanier v. Getting Organized, Inc. 155 Vt. 259, 265 (1990)

Applying these criteria to the present case, it must be concluded that the petitioner was the same party against whom the prior action was taken, that there was a final judgment on the merits, and that the same facts were raised with regard to the Family Court and Human Services Board matters. It must also be concluded that the petitioner had a full and fair opportunity to proceed in Family Court on these issues. In fact, the petitioner clearly had procedural safeguards in Family Court which are not afforded to him in an administrative proceeding, not to mention the assistance of counsel, which make for a high degree of accuracy and reliability in those findings. The fact that the findings had to be made by clear and convincing evidence also enhances their reliability for purposes of this forum.

There is absolutely no rationale for requiring the Department to retry those facts in this forum. The petitioner has put forth no grounds upon which it could be found that using the Court's findings in the former proceeding would be unfair to him now. Therefore, it must be found that the Human Services Board is collaterally estopped from retrying those issues again. The petitioner is similarly collaterally estopped from trying to attack the reliability of those issues in this forum. If there is any relief available to him on that issue, it is in the Family

Court, not the Human Services Board.

The Board is required in addition to finding facts, to determine whether those facts constitute sexual abuse as it is defined in the statute at issue regarding reports of sexual abuse of children to the child welfare agency, SRS. 33 VSA ' 4912 et seq. (Subchapter 2, of Chapter 49 of Title 33.) In this instance, the Family Court made its finding that the facts it found constituted "sexual abuse" under the statute authorizing relief from abuse. 15 V.S.A. ' 1103. Ordinarily, the Board would not be bound by such a legal conclusion since it stems from a different statute. However, a close reading of that statute reveals that the Family Court is required to use the same definition of sexual abuse as is used by SRS in its substantiations:

The following words as used in this chapter shall have the following meanings:

. . .

(C) abuse to children as defined in subchapter 2 of chapter 49 of Title 33.

15 V.S.A. ' 1101

The Family Court has determined that the acts it found meet the definition of sexual abuse of a child found in the very statute which the Board must use. No argument has been raised that it would be inappropriate for the Board to accept that conclusion. Indeed, to reconsider and possibly to reach a separate result here with regard to that issue

would create an inconsistency which is tantamount to a collateral attack on the Family Court's decision. It would be inappropriate to reopen that issue now. Even if the Board were persuaded that it should be reopened, it is highly unlikely based on the plethora of negative findings against the petitioner in this matter that the Board would reach a different conclusion with regard to the conduct proscribed by the statute at Title 33. Therefore, the Board should adopt as well the conclusion of the Family Court that the facts it found indicated by clear and convincing evidence that the child was sexually abused by her father.

The petitioner's assertion that he wants to attack SRS' initial substantiation at this hearing because it was not based upon accurate and reliable information is a request which places form over substance. Regardless of what evidence may have existed in December of 1992, which prompted the Department to make its finding, the abundant evidence presented in the Court hearing which spanned the next two years cannot be ignored in determining whether or not to expunge the finding. If it were ignored and the expungement granted for that reason alone, SRS would undoubtedly be required to enter a new substantiation the next day based on the findings of the Family Court, which finding would again be upheld by the Board based on the Family Court's findings and the doctrine of collateral

estoppel. The petitioner's complaints about internal processes and procedures used by SRS to substantiate complaints are not areas which the Board has the power to direct. The Board may only determine whether the substantiation presented to it is accurate and reliable which determination often incidentally reflects on the procedures and processes used to make the substantiation. However, if the petitioner is seeking some kind of injunctive relief or damages against the Department, this is not the correct forum.

It must be concluded that the petitioner has had a fair and exhaustive opportunity to challenge the allegations of SRS in another forum which provides protection and procedures far superior to those of this administrative process and that it is not unfair to the petitioner to adopt the findings and conclusions of the Court with regard to the sexual abuse and, in fact, those findings should be binding on the Board. As the Court's findings confirm the accuracy and reliability of SRS' allegations, the request to expunge the substantiation from the registry cannot be granted.

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